Supreme Court, U. S.
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No. 74-1608

In the Supreme Court of the United States

OCTOBER TERM, 1975

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION

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The National Association for the Advancement of Colored People, *et al.* (Petitioners) filed a petition with the Federal Power Commission seeking the promulgation by the Commission of rules regulating the employment practices of jurisdictional natural gas companies and electric utilities. Petitioners claimed that the Commission had authority to regulate these matters under various sections of the Federal Power Act, 16 U.S.C. §791a, *et seq.*, and the Natural Gas Act, 15 U.S.C. §717, *et seq.* Petitioners further alleged that the Constitution required the Commission to regulate employment practices, lest the Commission, due to the extent of its regulation under the Acts, become a "partner" in private discriminatory behavior. The Commission dismissed the petition for lack of jurisdiction (Pet. App. B).

On review, the court of appeals held that the Commission does have the authority to promulgate rules governing the employment practices of its regulatees (Pet. App. D). The court distinguished between "two kinds of jurisdiction" in evaluating the extent of the Commission's authority in this area: (1) jurisdiction over employment discrimination *per se, i.e.*, the power to "prescribe personnel practices in detail and to receive complaints, adjudicate them and punish directly infractions of those practices" (*id.* at 7); (2) jurisdiction "to take into account, in the performance of its regulatory functions, including licensing and rate review, evidence that the regulatee is a demonstrated discriminator in its employment relations" (*id.* at 8). The court concluded that, although the Commission lacks the first of these "kinds of jurisdiction," it possesses the second.

On June 20, 1975, the Commission filed a petition for a writ of certiorari (No. 74-1619) to review the judgment of the court of appeals insofar as it requires the Commission to investigate employment discrimination in the course of its routine economic regulatory activities. The Commission argued, *inter alia*, in that petition that the decision improperly imposes upon the Commission a burdensome obligation to regulate matters over which it lacks both statutory authority and expertise.

The petition in the present case seeks review of the court of appeals' ruling that the Commission lacks jurisdiction directly to regulate employment practices, but only in the event that the Commission's petition in No. 74-1619 is granted.

The Commission believes that the decision below is correct with respect to the Commission's lack of authority to regulate employment practices *per se*. In the Commission's view, however, the same reasoning which supports the court's decision on that issue undermines its holding that

the Commission must investigate employment discrimination in the course of its routine regulatory activities. The Commission believes, therefore, that both of these issues are in many respects identical.

In these circumstances, in the event that the Court grants the Commission's petition in No. 74-1619, it would be appropriate for the Court also to grant the petition in No. 74-1608.

Respectfully submitted.

DREXEL D. JOURNEY,
General Counsel.

ALLAN ABBOT TUTTLE,
Solicitor.

AUGUST 1975.

I authorize the filing of this memorandum.

ROBERT H. BORK,
Solicitor General.

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